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Supreme Court, U.S.
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No. 04-1218

IN THE
Supreme Court of the United States

NATIONAL HERITAGE INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES ex rel. TONI R. BARRON
and VICKY SCHEEL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit erred in applying its standard multi-factor test for determining whether an entity is an arm of the state for Eleventh Amendment purposes – a test that emphasizes the state's legal liability for a judgment against an entity, in this case a private, for-profit corporation that contracted with the State of Texas to serve as a Medicaid claims administrator.

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INTRODUCTION

In determining whether an entity is an "arm of the state" for Eleventh Amendment immunity purposes, this Court considers multiple "indicators of immunity or the absence thereof," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) – including how state law defines the entity and the degree of control the state exerts over the entity – and gives particular weight to whether the state would be liable for a judgment against the entity. *Id.* at 44-48. The courts of appeals, including the Fifth Circuit in the decision below, follow this Court's guidance and use multi-factor tests that pay particular attention to the state liability factor.

In its petition for a writ of certiorari, Petitioner seizes on out-of-context language and on inconsequential differences in how the circuits describe their multi-factor tests to support its assertion that multiple circuit conflicts exist over when an entity should be deemed an arm of the state. In an attempt to depict a conflict, Petitioner principally relies on *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000). However, the Fifth Circuit specifically distinguished *Shands* in its decision below. Furthermore, contrary to Petitioner's assertions, although the courts of appeals have rarely needed to consider whether a private, for-profit entity should enjoy the constitutional immunity generally reserved for the states, the circuits that have considered the issue have applied their standard multi-factor tests to private, as well as public, entities. In short, the approaches used by this Court and the courts of appeals for determining whether an entity is an arm of the state are remarkably consistent. Accordingly, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

Toni Barron, a speech language pathologist, and Vicky Scheel, a physical therapist (collectively, "the relators"), provided therapeutic services to students in Texas school districts. After witnessing fraudulent Medicaid billing for student health related services, they filed a qui tam action under the False Claims Act, 31 U.S.C. § 3729, alleging that National Heritage Insurance Company (NHIC), Deloitte & Touche, and Medicaid Claim Solutions of Texas knowingly submitted or caused to be submitted false claims to the United States for Medicaid reimbursement funds. In particular, they alleged that Deloitte & Touche and Medicaid Claim Solutions instructed local school districts to engage in improper Medicaid billing practices, and that NHIC, which processed claims and distributed Medicaid funds, acquiesced in those billing practices by failing properly to monitor claims and payments.

NHIC moved to dismiss the case, arguing that it was immune from suit under the six-factor test used by the Fifth Circuit to determine whether an entity is an arm of the state for Eleventh Amendment purposes. The district court agreed and granted the motion.

In their briefs on appeal to the Fifth Circuit, both NHIC and the relators analyzed the facts of the case under the Fifth Circuit's six-factor test. NHIC never argued that the Fifth Circuit should apply a different test because NHIC is a private entity.

The Fifth Circuit reversed, applying the six-factor test set forth in NHIC's and the relators' briefs. Under that test, the court looks at:

> 1. Whether the state statutes and case law view the agency as an arm of the state;
> 2. The source of the entity's funding;
> 3. The entity's degree of local autonomy;
> 4. Whether the entity is concerned primarily with local as opposed to statewide, problems;
> 5. Whether the entity has the authority to sue and be sued in its own name; [and]
> 6. Whether the entity has the right to hold and use property.

Pet. App. 3a.

The court explained that the second factor of the test is the most important factor and was the controlling factor in this particular case. The second factor looks at whether the state would be liable for a judgment against the entity and whether it is liable in general for the entity's debts and obligations. The court found that the contract between NHIC and Texas dictated that Texas would not be liable for judgments against NHIC and pointed out that no one claimed that Texas would be liable for NHIC's general debts and obligations. *Id.* 3a-4a.

The Fifth Circuit then turned to the other five factors in the six-factor test. With regard to the first factor, it noted that no state law or state case law identified NHIC as an arm of the state. It found the third and fourth factors difficult to apply in the context of private entities but pointed out that, with regard to the third factor, although NHIC had little discretion in fulfilling its contract with the state, it was an autonomous entity. As to the fourth factor, the court noted that although NHIC fulfilled a statewide rather than local function, its ultimate concern was with its investors. Finally, the court found that the fifth and sixth factors – sue-and-be-sued authority and the right to hold and use property – weighed

against a finding that NHIC was an arm of the state. The court concluded that NHIC was not an arm of the state and was therefore not entitled to Eleventh Amendment immunity. *Id.* 5a-8a.

REASONS FOR DENYING THE WRIT

I. The Purported Circuit Splits Identified By Petitioner Are Non-Existent.

A. The Circuits Agree That Courts Should Apply Their Standard Multi-Factor Tests for Determining Whether An Entity Is An Arm Of The State To Private As Well As Public Entities.

Petitioner argues primarily that there is a "direct conflict" over whether courts should apply the same test to private entities to determine arm-of-the-state immunity as they apply to public entities. Petitioner contends that the Fifth and Ninth Circuits apply the same inquiry but that the Eleventh Circuit has "expressly refused to apply its public entity analysis to private corporate entities." Pet. 8. In truth, however, the Eleventh Circuit, like the Fifth and Ninth Circuits, applies the same test to determine whether a private or public entity is an arm of the state for Eleventh Amendment purposes, and there is thus no circuit split.

Petitioner's claim of a circuit conflict on this issue rests entirely on its mischaracterization of one Eleventh Circuit case, *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000). In *Shands*, a hospital sued the private, third-party administrator of a state employee health insurance program and its subcontractor, a national

managed care company, asserting that it had not been paid for medical services provided. The Eleventh Circuit analyzed whether the corporations were entitled to Eleventh Amendment immunity. It explained that it used a multi-factor test to determine whether an entity is entitled to Eleventh Amendment immunity, considering "how state law defines the entity," "what degree of control the State maintains over the entity," "from where the entity derives its funds and who is responsible for judgments against the entity." *Id.* at 1311.

Petitioner contends that the Eleventh Circuit then held that the standard multi-factor test does not apply when the entities in question are private rather than public. Pet. 8. However, the Eleventh Circuit did no such thing. Rather, the court simply explained that, in applying the standard test, it is necessary to look at the entity in the context of the functions the entity fulfilled when it committed the actions for which it is being sued. *See Shands*, 208 F.3d at 1311 ("The pertinent inquiry is not into the nature of a corporation's status in the abstract, but its function or role in a particular context."). Thus, for example, instead of looking at the control the state had over the third-party administrator's business in general, the court looked at the control the state had over the corporation's administration of the state employee health program.

The Eleventh Circuit then applied its standard multi-factor test to the corporations in their roles as third-party administrator and subcontractor. It pointed out that state laws and contracts considered the corporations to be representatives of the state when running the employee health insurance program, that the state maintained control over the corporations' administration of the program, and that the program was funded through legislative appropriations. Then, like the Fifth Circuit, the Eleventh Circuit emphasized the

factor that considers the state's responsibility for judgments against the corporations. *See id.* at 1311-12 ("The dispositive question for Eleventh Amendment purposes is whether a judgment against [the corporations] would implicate the state treasury or interfere with the administration of the state group insurance program, or whether the claims constitute a private cause of action, arising out of tort or contract, for which [the corporations] would be financially responsible.").[1] In going through the factors, the Eleventh Circuit stressed that cases that found private entities entitled to Eleventh Amendment immunity did not provide those entities with all-purpose immunity, but rather found them to be immune only when they were acting in their roles as agents of the state. *Id.* at 1311.

Finally, the Eleventh Circuit considered each of the claims in the case individually. With regard to the first claim, the hospital argued that certain services it provided were "covered services" under the plan. The court pointed out that under state laws and contracts the state retained ultimate authority over coverage determinations, even allowing coverage denials to be appealed to the state, and that a judgment against the private entities would have an effect on the state treasury because the increased payouts for services found to be "covered services" would come from the state treasury fund. The court

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[1]Although Petitioner now selectively quotes this line from *Shands* to argue that *Shands* created a new test for private entities, Pet. 8, in its brief before the Fifth Circuit, it quoted this line only as part of its overall analysis of the state treasury factor of the Fifth Circuit's standard six-factor test. *See* Brief for Appellee National Heritage Insurance Company at 23, *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, No. 03-50507 (5th Cir.)

therefore found the entities entitled to immunity and dismissed the claim. *Id.* at 1312. With regard to the second claim, the hospital asserted it was due increased payments for certain services because the plan had not made the payments within 30 days. The court found that this claim, too, would implicate state funds because "payment for medical services rendered is an obligation of the state." *Id.* at 1313. It therefore dismissed that claim as well.

Contrary to Petitioner's assertions that *Shands* created a new test for private entities, the approach the Eleventh Circuit took in *Shands* is the exact approach it takes in deciding whether public entities are arms of the state. In *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1107 (2004), for example, the court considered whether a sheriff, acting in his official party, was an arm of the state for Eleventh Amendment purposes. Citing *Shands*, the court first explained that "whether a defendant is an 'arm of the state' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Id.* at 1308. Because the sheriff was being sued for excessive use of force, the "particular functions at issue [were the sheriff's] force policy at the jail and the training and disciplining of his deputies in that regard." *Id.* at 1308-09. Then, again citing *Shands*, the court set forth its multi-factor test and proceeded to apply the four factors to the facts of the case. *See also Abusaid v. Hillsborough County Bd. of County Comm'rs*, 2005 WL 858296, at *4 (11th Cir. April 15, 2005) (explaining, in a case involving a public entity, that "the arm of the state determination must be made on a function-by-function basis").

In short, just as in the Fifth and Ninth Circuits, the test the Eleventh Circuit uses for determining whether a private

entity is an arm of the state is the same test it uses for determining whether a public entity is an arm of the state. Thus, the circuit split claimed by Petitioner does not exist.

B. The Decision Below Properly Distinguished *Shands*.

Petitioner also contends that the test used by the Fifth Circuit in the decision below to determine whether NHIC was an arm of the state conflicts with the test used by the Eleventh Circuit to determine whether a private entity is an arm of the state. Pet. 9, 18. In making this argument, Petitioner once again relies solely on *Shands*. However, the decision below specifically distinguished *Shands*, explaining why the *Shands* court reached a decision that, on first glance, may look contrary to the Fifth Circuit's holding.

In *Shands* and the decision below, the Eleventh and Fifth Circuits reached different results as to whether the entities under consideration were arms of the state: *Shands* determined that the corporations at issue in that case were arms of the state, whereas the Fifth Circuit determined that NHIC was not. As the Fifth Circuit explained, however, there is a significant difference between NHIC and the entities at issue in *Shands*: "[I]n *Shands*, [the state] would have been legally liable for any judgment rendered. By contrast, NHIC has not shown that Texas would bear any legal liability for any damages assessed against NHIC in this case." Pet. App. 12a-13a. Because the state's liability for judgments against the private entity is given particular attention in the tests used by both the Fifth and Eleventh Circuits – and in the test used by this Court, *see Regents v. Doe*, 519 U.S. 425, 430-31 (1997) – the importance of this difference cannot be overstated. Furthermore, by pointing out this difference, the Fifth Circuit suggested that, like

the Eleventh Circuit, it might have considered the corporations in *Shands* to be arms of the state. There is thus no conflict between *Shands* and the decision below.

C. The Circuits All Use Essentially The Same Test For Determining Whether An Entity Is An Arm Of The State.

Unable to cite any cases that actually conflict with the decision below, Petitioner attempts to paint a picture of mass confusion among the circuits on the general question of how to determine whether an entity is an arm of the state. However, the cases cited by Petitioner all use essentially identical tests to answer that question.

First, Petitioner contends that recent decisions by the Fourth and Sixth Circuits demonstrate a conflict. In *Cash v. Granville County Board of Education*, 242 F.3d 219, 223 (4th Cir. 2001), the Fourth Circuit found that the "principal factor" in deciding whether an entity is an arm of the state "is whether a judgment against the governmental entity would have to be paid from the State's treasury." It noted that the state treasury factor is dispositive when the state is liable for a judgment against the entity, but that other factors should also be considered when the state is found not to be liable for judgments against the entity. The other factors listed by the Fourth Circuit were the degree of control exercised by the state, whether the entity's concerns are statewide or local, and how state law treats the entity. *Id.*

Petitioner claims that the *Granville* test is "dramatically different," Pet. 12, from the test used by the Sixth Circuit in *Ernst v. Roberts*, 379 F.3d 373 (6th Cir. 2004), *reh'g granted* (Nov. 17, 2004). To begin with, the Sixth Circuit has vacated

its decision in *Ernst* and agreed to rehear the case en banc. Moreover, in *Ernst*, the Sixth Circuit, like the Fourth Circuit, held that the state treasury factor is the most significant factor in determining whether an entity is an arm of the state. *Id.* at 382. It then declined to decide the significance of factors other than the state treasury factor, noting that "it is undisputed that there is sufficient evidence and legal authority to support a conclusion as to state treasury liability, and the other factors do not align together to counter the state treasury liability analysis." *Id.* at 383. The court recognized the possibility, however, that "in cases in which it appeared that there were no potential state treasury liability, but all or almost all of the other factors clearly indicated that the agency was akin to an arm of the state, perhaps immunity would apply." *Id.* In other words, the difference between *Granville* and *Ernst* – the difference Petitioner calls "dramatic[]" – is that whereas the Fourth Circuit explicitly found that the state treasury factor could be overcome by other factors when the state treasury would not be affected by a judgment against the entity, the Sixth Circuit noted the possibility of such an outcome, but did not reach the issue.

Petitioner next asserts that the test applied by the Fifth Circuit in the decision below "could not be more divergent from the one employed by the Fourth Circuit" in *Granville*. Pet. 12. However, both the Fourth and Fifth Circuits found that the state treasury factor is the most important factor in determining whether an entity is an arm of the state, and both circuits then proceeded to consider other, similar factors. Although there are minor differences in the multi-factor tests used by the two circuits – for example, the Fifth Circuit specifies in more detail the ways in which state-law treatment of the entity might affect whether the entity is an arm of the state and thus employs a six-factor test where the fourth circuit uses a four-factor test – it is

difficult to see any substantive conflict between the Fourth and Fifth Circuits' approaches.

Finally, Petitioner mentions the tests used by the Second and Tenth Circuits, as part of its argument that, "from circuit to circuit, an entity may face markedly different requirements to invoke arm of the state immunity." Pet. 14. However, the tests used in the Second and Tenth Circuits are, in fact, remarkably similar to tests used in the other cases cited by Petitioner. In *McGinty v. New York*, 251 F.3d 84 (2d Cir. 2001), the Second Circuit recited six factors: how the entity's documents of origins refer to it, how its governing members are appointed, how it is funded, whether its role is traditionally undertaken by state or local government, whether the state has veto power over its actions, and whether the state is responsible for the entity's financial obligations. If these factors point in different directions, and if the matter does not become clear after looking at whether a suit against the entity would threaten the state's integrity and expose its treasury to risk, concern for the state's treasury controls. *Id.* at 95-96. Like its sister circuits, the Second Circuit stresses that "'the vulnerability of the state's purse [is] the most salient factor.'" *Id.* at 100 (quoting *Hess,* 513 U.S. at 48). In the Tenth Circuit, the court examines "the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state" and "the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000) (internal citation omitted). It also views state treasury liability as a particularly important factor. *See id.*

In short, all of these circuits use a multi-factor analysis for determining whether an entity is an arm of the state. All

look at the entity's status under state law, the state's control over the entity, and the effect of a judgment against the entity on the state treasury. All place particular stress on the state treasury factor. Although the circuits describe their tests somewhat differently, there is no meaningful circuit split.

II. The Fifth Circuit's Test For Determining Whether An Entity Is An Arm Of The State Does Not Conflict With This Court's Precedent.

Petitioner claims that the Fifth Circuit's approach in the decision below conflicts with this Court's jurisprudence. Contrary to Petitioner's contentions, however, the Fifth Circuit's analysis for determining whether an entity is an arm of the state for Eleventh Amendment purposes is entirely consistent with this Court's precedents.

The decision below followed this Court's analysis in *Hess,* 513 U.S. 30. There, this Court considered whether the Port Authority Trans-Hudson Corporation, an enterprise created by a bi-state compact, was an arm of the state. The Court examined a number of factors, including indicators of state and local control, whether statutory and case law considered the entity a state agency, whether the entity's functions were state or local, whether the state was financially responsible for the entity, and whether the state bore liability for the entity's debts. *Id.* at 44-46. After finding that these factors pointed in different directions, the Court noted that the "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* at 48. It went on to explain that the proper focus, in determining whether an entity is an arm of the state, should be on whether "the State [is] in fact obligated to bear and pay the resulting indebtedness of the enterprise[.] When the answer is 'No' –

both legally and practically' – then the Eleventh Amendment's core concern is not implicated." *Id.* at 51; *see also Regents v. Doe*, 519 U.S. 425, 430 (1997) (explaining that, in *Hess*, the Court "focused particular attention on the fact that 'both legally and practically' neither of the relevant States would have been obligated to pay a judgment obtained against the bistate entity"). In other words, this Court applied a multi-factor test, placing the most emphasis on whether the state would be liable for a judgment obtained against the entity. This is exactly the approach taken by the Fifth Circuit below, and by all the other circuits as well.[2]

Emphasizing the language in *Hess* that the proper focus of the inquiry is whether the state will be legally or *practically* obligated to bear an entity's debts, Petitioner asserts that the Fifth Circuit should have looked not only at whether Texas would be legally liable for a judgment against NHIC, but at

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[2]Petitioner is incorrect in asserting that the Fifth Circuit "in effect, create[d] a one-factor test for corporate entities," Pet. 14, that focuses exclusively on whether the entity has an indemnity agreement with the state. Although the Fifth Circuit did mention NHIC's agreement to indemnify Texas, it found the agreement significant because the agreement "conclusively establishes that Texas will suffer *no legal liability* for any damages assessed against NHIC." Pet. App. 4a (emphasis in original). In other words, the court focused not on whether there happened to be an indemnity agreement between the state and NHIC, but on whether there was any possibility that the state would be held liable for a judgment against NHIC. In addition, the Fifth Circuit proceeded to analyze NHIC under the other five factors in its six-factor test for determining whether an entity is an arm of the state. *Id.* 5a-8a.

whether, somewhere down the road, a judgment against NHIC may have some sort of effect on the state treasury. It contends that a judgment against NHIC would have a practical effect on the state treasury because it would cause NHIC to charge more for its services.

Petitioner's narrow focus on the word "practically" causes it to lose sight of the fact that this Court's focus is on whether a state will be *obligated*, legally or practically, to pay a judgment obtained against an entity. NHIC may choose to raise its rates in anticipation of being found liable for violations of federal law, and Texas may choose to continue procuring NHIC's services even after it raises its rates. However, a state's decision to renew a contract at a higher rate is not equivalent to the state having an *obligation* to pay a judgment obtained against the contractor.

Moreover, in *Regents v. Doe*, 519 U.S. 425, this Court firmly rejected focusing on the ultimate economic impact of denying an entity immunity and instead looked to whether the state would be liable for a judgment obtained against the entity. In *Regents*, the Court considered whether a state instrumentality could invoke Eleventh Amendment immunity when the federal government had agreed to indemnify the instrumentality against the costs of litigation. The Court held that the state instrumentality had immunity even though, because the federal government was going to indemnify the state, a finding of liability against the state instrumentality would not have affected the state treasury at all. In reaching that conclusion, the Court made clear that the inquiry was not about whether a finding of liability would have a practical effect on the state treasury. Instead, the Court found that it was the state's "potential legal liability" that was relevant. *Id.* at 431. In focusing on whether Texas would be legally liable for a

judgment against NHIC instead of on whether the decision would have a practical impact on the state treasury, the Fifth Circuit was directly following this Court's guidelines.[3]

Finally, even if this Court did apply a test that looked at the practical effects of a judgment against NHIC on the state treasury, the state treasury factor still would not weigh in NHIC's favor. Since the events that prompted this lawsuit, Texas has stopped contracting with NHIC to administer its Medicaid program. Therefore, there is no possibility that the state would, even in a purely practical way, "bear and pay the resulting indebtedness" of a judgment against NHIC. *Hess*, 513 U.S. at 51.

This Court has identified two rationales for Eleventh Amendment immunity: "to preven[t] federal-court judgments that must be paid out of a State's treasury," and "to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (internal citations and quotation marks omitted). "When indicators of immunity

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[3]Petitioner claims that, "since the decisions of this Court in *Hess* and *Regents*," Pet. 19, circuit courts have developed state treasury analyses that focus on the practical effects of a judgment instead of on direct liabilities faced by states. However, Petitioner cites only two cases, neither of which supports its position. First, Petitioner cites *Shands*, in which, as discussed above, the state would have been legally liable for certain payments if judgment were entered against the private entities. The other case cited by Petitioner, *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995), was decided *before* this Court's decision in *Regents*.

point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide." *Hess*, 513 U.S. at 47. Here, Respondents' qui tam action against NHIC implicates neither of the concerns underpinning Eleventh Amendment immunity. The contract between NHIC and the state dictated that NHIC would pay its own judgment. And requiring a private, corporate entity to respond to complaints in court would not affect Texas's dignity or integrity. Thus, the twin rationales for Eleventh Amendment immunity support the Fifth Circuit's determination that NHIC is not an arm of the state.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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